NO. 21451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS ROBERT H. MYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following trial by jury (C.T. 5).[1/]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that appellant knowingly imported and brought approximately 26 pounds of marihuana into the United States from Mexico contrary to Title 21, United States Code, Section 173 (C.T.2).

The second count alleged that appellant knowingly concealed and facilitated the transportation and concealment of, approximately 26 pounds of marihuana, which, as he then and there well knew had been imported and brought into the United States contrary to law (C.T.3).

Jury trial of appellant commenced on September 14, 1966 before United States District Judge Luther W. Youngdahl. Appellant was found guilty as charged on both counts on September 15, 1966 (C.T.5).

Thereafter, on September 30, 1965, appellant was committed to the custody of the Attorney General for five years upon Count One and five years upon Count Two to run concurrently with Count One (C.T.10).

Appellant subsequently filed a notice of appeal (C.T. 11).

III

ERROR SPECIFIED

Appellant has specified only one point upon appeal:

"That the verdicts are not supported by substantial evidence."

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at about 11:00 P.M. on July 2, 1966. He was driving a car he had rented (R.T.9,17,33,43,51,65).

Appellant was from Canada (R.T.9,51). His passengers were two negro servicemen from the Missile Base at Malibu Beach, California (R.T. 10,16,28).

One of the servicemen, Wesley Kennedy, was seated with appellant in the front seat and Rudolph Waters was seated on the left-hand side of the rear seat (R.T. 33,40,49).

Immigration Inspector referred the vehicle and its occupants to the secondary inspection area for further search (R.T. 10,15).

At secondary, Herbert W. Ray, Customs Inspector, noted that the rear seat, "bottom cushion was protruding up on the right-hand side." He lifted the cushion and noticed packages of marihuana (R.T.15). Ray removed 19 kilo size bricks of marihuana weighing 26 pounds (R.T. 17,18).

The bricks were under the rear seat cushion and appeared to Inspector Ray to have fallen from behind the back rest. Ray also testified that the back rest. Ray also testified that the back seat must be removed before the marihuana could be placed behind the back rest (R.T.67,68).

The two servicemen were released by Customs Agent Donalson after consulting with the United States Attorney (R.T.21,6,27).

Wesley Kennedy, one of the passengers, testified he first met appellant on July 2, 1967 the date of their arrest, at 8:55 A.M. through

Private Waters (R.T.29). Waters testified he met appellant the day previous to their arrest while trying to get a ride back to the base. The buses had stopped running (R.T.41-43).

Waters had $30 of his net service pay of $109.00 (R.T.31), while Kennedy had only $10 of his net pay of $30 (R.T. 50).

The marihuana cost no less than $475 and as much as $1,200 according to Agent Donalson (R.T.70-71).

They arrived in Tijuana the afternoon of their arrest and after riding around, appellant parked the car on a parking lot, locked the car and left the key with the attendant (R.T.31). The servicemen went one way and appellant went the other (R.T. 36,38,48,62).

They returned to the car once and appellant wasn't there. They returned again and appellant was sitting in the car (R.T.36). The car had been moved (R.T.62).

Neither Waters nor Kennedy had been to Tijuana before (R.T.34) and neither had ever seen marihuana and never bought any marihuana in Mexico (R.T.32,45,50,51,58).

V

ARGUMENT

A. APPELLANT WAIVED HIS RIGHTS TO RAISE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE ON APPEAL.

Appellant's argument amounts to a contention that the evidence was insufficient to support the judgment of conviction.

Appellant made no motion for judgment of acquittal at the close of the

trial.

Appellant has waived his right to question sufficiency of the evidence on appeal.

Lupo v. United States , 322 F.2d 569 (9th Cir. 1963)

Hardwick v. United States, 296 F.2d 24 (9th Cir. 1961)

B. THE PLAIN ERROR RULE SHOULD NOT APPLY.

The conviction should not be reversed as to the issue of sufficiency of the evidence unless there is plain error.

The facts in this case do not justify the finding of plain error. Though such a finding is clearly within the power of the Appellate Court it is "a power rarely exercised."

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States, 287 F.125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule have been taken in other Circuits.

Johnson v. United States, 291 F.2d 150 (8th Cir. 1961)

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)

And especially where appellant was represented at the trial by competent and experienced counsel, as in this case, it is submitted plain error should not be recognized readily.

C. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT OF CONVICTION.

Assuming arguendo, that appellant was entitled to review of the issue

of sufficiency of the evidence, the evidence is sufficient to support the conviction.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U.S.60 (1942)

Stein v. United States, 337 F.2d 14 (9th Cir. 1964)

Considering the facts most favorable to the government, there can be no dispute that appellant was in actual possession of the marihuana. The only question is knowledge.

The verdict is supported by substantial evidence. It was appellant had the car under his control and custody. Appellant rented the car. Appellant drove the car into the United States from Mexico with marihuana concealed in it. Appellant locked the car on the parking lot in Mexico. Appellant was alone in Mexico. Waters and Kennedy, his passengers, were together. Appellant was seated in the car when Waters and Kennedy returned to the car the second time.

Rental cars are commonly used by commercial smugglers.

Appellant apparently had no particular purpose in California. He could afford to rent a car. By way of contrast the finances of the servicemen passengers certainly didn't permit them to buy marihuana in Mexico costing from $475 to $1200. They had never been to Mexico before.

Waters had $10 left out of his pay of $30 and Kennedy had $30 out of his pay of $100.

Appellant relies heavily upon the teachings of Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962).

That case is clearly distinguishable from the instant case on its facts. In that case, the Court said at page 603:

"Mrs. Arellanes presence is as fully explained by her attachment to her husband as it might be by a control over the drugs."

But, as in the case at hand, Mrs. Arellanes position "with respect to control over the drugs is to be contrasted with what the evidence shows to be the position of her husband. . . . Thus, Mr. Arellanes is shown to have been in exclusive control and dominion of the vehicle throughout the relavant period. This factor, as we have had occasion to say before, 'is a potent circumstance tending to prove knowledge of the presence of (the) narcotics, and control thereof.'"

It can thus be seen that Mr. Arellanes was in the same situation as appellant finds himself. He was in sole direction and control of a car he had rented, parked and locked. He was driving the vehicle at the time the smuggling occurred.

Appellant seems to place emphasis on the fact he loaned his car to Mr. Kennedy a few hours the night before. Mr. Arellanes had loaned his car for an extended period (supra at 607). Mr. Arellanes conviction was not reversed by this Court.

Appellant contends the law requires the evidence to be inconsistent with every reasonable hypothesis of appellant's innocence.

Appellant requested no such instruction. The often cited Supreme

Court case of Holland v. United States, 348 U.S.21 (1954) says, on this point, at page 139,

"but the better rule is that where the jury is properly instructed on the standard of reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

The jury was properly instructed as to reasonable doubt (R.T.85,86, 88,89).

D. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND POSSESSION IN APPELLANT.

Possession is sufficient to convict unless explained to the satisfaction of the jury. See Title 21, United States Code, Section 174.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

This certainly doesn't mean appellant must testify or put on a case, but evidence must be produced in some manner to explain once possession is shown to be in appellant, as is contended here. No such evidence was produced.

VI

CONCLUSION

The foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT,
Assistant United States Attorney